IN THE

Supreme Court of the United States

October Term, 1976

No. 76-471

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ANTHONY CONSOLAZIO,

Respondent.

SUPPLEMENTAL APPENDIX

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Appendix B

Order on Appeals from Judgment of Conviction and Orders

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 31, 1975.

HON. SAMUEL RABIN, *Acting Presiding Justice,*
HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
HON. JOHN P. COHALAN, JR.
HON. MARCUS G. CHRIST

Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant-Respondent,

v.

ANTHONY CONSOLAZIO,
Respondent-Appellant.

In the above entitled action, the parties have cross appealed to this court as follows: (1) the above named The People of the State of New York, plaintiff, appeals from (a) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively, which dismissed 41 counts of the indictment, and (b) a written trial order of dismissal made by the same court and entered on January 10, 1975, dismissing said counts; and (2) the above named Anthony Consolazio,

defendant, appeals from a judgment of the same court, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence; and the said appeals having been argued by Jules E. Orenstein, Esq., of counsel for the appellant-respondent and argued by Michael J. Obus, Esq., of counsel for the respondent-appellant, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that the trial orders of dismissal appealed from are hereby modified, on the law, by deleting therefrom the enumeration of counts dismissed except counts 1 and 27 and motions for a trial order of dismissal denied except as to said two counts; and, as so modified, the orders are unanimously affirmed and new trial ordered as to the counts which are hereby thus reinstated and further proceedings not inconsistent with this court's opinion and decision slip, dated March 31, 1975, are directed, and it is further

ORDERED that the case is hereby remitted to the County Court, Nassau County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division

THE PEOPLE OF THE STATE OF NEW YORK, Appellant-Respondent, v ANTHONY CONSOLAZIO, Respondent-Appellant. —Cross appeals as follows: (1) The People appeal from (a) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively, which dismissed 41 counts of the indictment, and (b) a written trial order of dismissal made by the same court and entered on January 10, 1975, dismissing said counts; and (2) defendant appeals from a judgment of the same court, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence. Judgment affirmed. Trial orders of dismissal modified, on the law, by deleting therefrom the enumeration of counts dismissed except Counts 1 and 27 and motions for a trial order of dismissal denied except as to said two counts. As so modified, orders affirmed and new trial ordered as to the counts which are hereby thus reinstated and further proceedings not inconsistent herewith are directed, including proceedings pursuant to CPL 460.50 (subd. 5). Defendant was indicted and charged with 57 counts of grand larceny in the second and third degrees, committed as part of a common plan or scheme. During the trial, one count was severed and nine were dismissed on consent. At the close of the People's case, trial orders of dismissal were granted as to 41 counts. With the exception of Count 1 (a general count naming all persons from whom defendant was accused of wrongfully taking money) and Count 27 (pertaining to a man to whom defendant made no representations), the orders of dismissal were improperly granted. In our opinion, there was legally sufficient evidence to support the other 39 counts under a theory of larceny by false pretenses or larceny by false promises (Penal Law, §155.05, subd. 2,

pars. [a], [d]; *People v Sabella,* 35 NY2d 158, 167). The prosecutor, during the course of the trial, denied that he had any prior statements of the complaining witnesses. It later appeared that he possessed question and answer sheets which had been filled in by a detective or an Assistant District Attorney. Prior to the new trial, a hearing should be held to determine the circumstances under which those documents were prepared and whether they should be given to defense counsel for the purpose of cross-examination (*People v Horton,* 19 AD2d 80). We have examined the documents as they relate to those counts of which defendant stands convicted and conclude that, even assuming that they should have been made available to him, no prejudice resulted from the failure to so make them available (*People v Byrams,* 34 AD2d 556). Rabin, Acting P.J., Hopkins, Martuscello, Cohalan and Christ, JJ., concur.

Appendix C

Opinion of Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

2 No. 288

THE PEOPLE &c.,

Respondent,

vs.

ANTHONY CONSOLAZIO,

Appellant.

JONES, J.:

On this appeal, we agree with defendant that under principles of double jeopardy as enunciated by the United States Supreme Court the People were barred from appealing to the Appellate Division from the trial order dismissing certain counts of defendant's indictment. We reject, however, defendant's contentions that because his challenge to the jury panel was denied and because he was denied disclosure of prosecution notes of pretrial witness interrogations, reversible error was committed wtih respect to those counts on which he was found guilty.

During the years 1968 to 1971, appellant, an attorney, approached numerous individuals in his community with proposals that they invest in various schemes yielding quick, high interest returns. Many of these people, who had known appellant as an attorney, friend, customer,

neighbor or employee, gave him money; no significant portion of any of the "invested" funds was ever returned. In consequence appellant was indicted on 57 counts, 44 for grand larceny in the second degree and 13 for grand larceny in the third degree. At trial in Nassau County Court one count was severed; 50 counts were dismissed at the conclusion of the People's case, nine with the consent of the prosecutor; and appellant was convicted on the remaining six counts. Cross appeals were taken to the Appellate Division. On appellant's appeal the six convictions were affirmed. On the People's appeal the Appellate Division reinstated 39 of the 41 counts which had been dismissed over the People's objection, and the dismissal of the other two counts was affirmed.

We first deal with the appeal taken to the Appellate Division by the People from the trial order of dismissal. Under our decision of *People* v *Brown* (39 NY2d ——, decided June 17, 1976) such appeal was barred under the Supreme Court's formulation of the right not to be placed twice in jeopardy. Accordingly the order of the Appellate Division must be modified, and the case remitted to that Court for dismissal of the appeal taken by the People to that Court.

As to the six counts on which the jury returned a verdict of guilty, appellant advances several contentions that errors committed during his trial require reversal of his convictions thereon. We conclude that none of such contentions is of sufficient substance to warrant reversal; some, however, merit brief attention.

It is first contended that the prosecutor's failure to turn over certain "worksheets" compiled in preparation for trial and the trial court's acquiescence in such refusal constituted reversible error. These worksheets were in the form of unsigned questionnaires containing printed questions (e.g., "When did you first meet Mr. Consolazio?"

"Who introduced you to him?" and "How did it come about that you invested with him?") and handwritten notes made by the interviewing officer that capsulized the witness's answers thereto. During trial defense counsel requested that the prosecution turn over (a) all exculpatory material as required under *Brady* v *Maryland* (373 US 83) and *People* v *Simmons* (36 NY2d 126) and (b) all prior statements made by prosecution witnesses as required under *People* v *Rosario* (9 NY2d 286, reargument den 9 NY2d 908, cert den 368 US 866, reargument den 14 NY2d 876, reargument den 15 NY2d 765). While the prosecutor turned over all grand jury testimony of each of the various witnesses, existence of the worksheets was not at that time revealed. When ti came out later in the trial that such question-answer sheets did exist, defense counsel demanded their disclosure under both a *Brady* and a *Rosario* rationale. The trial court found that the worksheets did not fall within *Rosario* in that they constituted a person's "conception" of what a prospective witness told him rather than the "statements" of such witness. As to the *Brady* branch of the defense motion, the Court refused to examine all the worksheets as requested by defense counsel but rather accepted the prosecutor's representation that nothing contained in the questionnaires constituted exculpatory material.

At the Appellate Division that Court itself examined the worksheets and concluded that "even assuming that they should have been made available to [the defense], no prejudice resulted from the failure to so make them available". We concur in result.

With respect to the *Brady* aspect of appellant's argument, we agree that it was error for that Court not itself to have examined the worksheets to determine whether, as claimed by the defense, such worksheets contained exculpatory material. While a prosecutor must of necessity

"have *some* discretion in determining which evidence must be turned over to the defense" (*People* v *Fein*, 18 NY2d 162, 171-172; emphasis in original), where, as here, there was some basis for argument that material in the possession of the prosecutor might be exculpatory, deference to the prosecutor's discretion must give way, and the duty to determine the merits of the request for disclosure then devolves on the trial court. We have, however, examined the worksheets, as did the Appellate Division, and we agree with that court that nothing contained therein constituted exculpatory material. Thus, while we agree that the trial court erroneously relied on the representations of the prosecutor as to the nonexistence of exculpatory material, we conclude that such error was harmless. In so concluding, we find it to be of critical significance that the error related to the procedure by which it was determined that the worksheets contained no exculpatory material, not to the determination itself.

With respect to the *Rosario* branch of defendant's argument, we hold that the trial court erroneously concluded that the worksheets did not constitute "prior statements" of prosecution witnesses within the contemplation of the rule of that case. The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature. Thus it has been held that a witness's statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is "a record of a prior statement of a witness within the compass of the rule in *People* v *Rosario* . . . and therefore not exempt from disclosure as a 'work product' datum of the prosecutor." (*People* v *Hawa*, 15 AD2d 740, affd 13 NY2d 718; and see *People* v *Horton*, 19 AD2d 80, affd 18 NY2d 355; cf *People* v *Butler*, 33 AD2d 675, affd 28 NY2d 499.) Accordingly we conclude that the prosecutor's worksheets, containing

as they do abbreviated notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of our holding in *Rosario*. Indeed this was obliquely recognized by the district attorney, who with commendable candor informed the trial court that the signatures of the witnesses were not affixed to the questionnaire forms when completed in the hope that *Rosario* disclosure could thereby be obviated.

Turning then to whether the withholding of such worksheets must here result in the setting aside of defendant's conviction, we conclude not in the circumstances of this case. We hold, of course, that a failure to turn over *Rosario* material may not be excused on the ground that such material would have been of limited or of no use to the defense, or that a witness's prior statements were totally consistent with his testimony at trial. (*People* v *Malinsky*, 15 NY2d 86, 90-91; *People* v *Paige*, 48 AD2d 6; cf *People* v *Zabocky*, 26 NY2d 530, 536-537; *People* v *West*, 29 NY2d 728; *People* v *Peacock*, 31 NY2d 907; *People* v *Sanders*, 31 NY2d 463.) We thus reject arguments that consideration of the significance of the content or substance of a witness's prior statements can result in a finding of harmless error.[1]

The present case, however, presents a significantly different issue. Our examination of the grand jury testimony of the various prosecution witnesses (which testimony was turned over by the prosecutor to the defense) reveals that the witness's statements contained in the worksheets were

1. To be distinguished are those appeals from pre-*Rosario* convictions as to which this Court applied a harmless error analysis where violations of the *Rosario* rule were found. (See, e.g., *People* v *Rosario*, 9 NY2d 286, 291, *supra; People* v *Hernandez*, 10 NY2d 774; *People* v *Turner*, 10 NY2d 839; *People* v *Fasano*, 11 NY2d 436; *People* v *Hurst*, 10 NY2d 929; *People* v *Perira*, 11 NY2d 784; *People* v *Hawa*, 13 NY2d 718, *supra; People* v *Horton*, 18 NY2d 355, *supra;* for a statement to this effect see *People ex rel Cadogan* v *McMann*, 24 NY2d 233, 237.)

the same as the statements made by such witnesses before the grand jury. The worksheets in this instance were nothing more than duplicative equivalents of statements previously turned over to the defense—the only difference being as to the particular form in which such statements were recorded. In this circumstance it was not error to fail to turn over worksheets which would have been cumulative only. (Compare *People* v *Kass,* 25 NY2d 123, 127.)

In reaching the conclusion that we do in this case we make a supplemental observation. When *Rosario* material is requested by a defendant, in the ordinary situation it should be of negligible practical significance whether on comparative examination such material would or would not prove to be equivalent duplicate of material already in the defendant's possession. On the one hand, if inspection were to lead to the conclusion that the material sought was a counterpart of other material already possessed by the defendant, the prosecutor would have infrequent occasion to object to its disclosure. On the other hand, if examination were to disclose that it was not a duplicative equivalent, then, of course, the defendant would be entitled to full disclosure. Reflection thus suggests that once it is determined that the writings sought by the defendant come within the *Rosario* rule, the better practice would be to direct a turnover forthwith. No sufficiently useful purpose would appear to be served by engaging in a collateral analysis as to whether the defendant would or would not be technically entitled to disclosure.

We do not reach appellant's challenge to the jury panel. It is explicitly provided in CPL 270.10(2) that such a challenge must be made "in writing" and "before the selection of the jury commences, and, if it is not, such challenge is deemed to be waived." In this instance while a motion to challenge the jury panel was made orally before jury selection began (and then rejected) the written notice was not

given until after selection of the jury had been completed although before any witness had been sworn. In this circumstance, irrespective of the willingness of the trial court to consider the motion on the merits, the error if any in the denial of the motion was not preserved for our review. We accord no substance to appellant's further contention that his challenge was predicated on constitutional grounds and that the strictures of §270.10(2) apply only to challenges based on "departure from the requirements of the judiciary law." We read §270.70(2) as intended by the Legislature to govern all challenges to the panel, whatever may be the particular ground advanced.

As to appellant's other contentions, it suffices to note that in our opinion the refusal of the trial court to charge explicitly with reference to "reliance" as an essential element of larceny by false premise was not error in view of the verbatim quotation of the applicable sections of the penal law in full. Similarly, in consequence of the failure of defense counsel to register a protest, any error with respect to the right of the jury to consider evidence presented to support the dismissed counts was not preserved for our review.

Accordingly the order of the Appellate Division should be modified by reversing so much of the order as reinstated 39 of the counts dismissed by the trial court and the case remitted to the Appellate Division with directions that the appeal by the People with respect thereto be dismissed, and, as so modified, the order should be affirmed.

• • •

Order modified and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jones, J. All concur.

Decided July 6, 1976

Appendix D

Remittitur of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 288

THE PEOPLE &c.,

Respondent,

vs.

ANTHONY M. CONSOLAZIO,

Appellant.

The appellant(s) in the above entitled appeal appeared by James J. Mc Donough; the respondent(s) appeared by Denis Dillon, District Attorney, Nassau County.

The Court, after due deliberation, orders and adjudges that the order of the Appellate Division is modified and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jones, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 6, 1976.

Appendix E

Order on Remittitur from the Court of Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 20, 1976.

HON. JAMES D. HOPKINS, Acting Presiding Justice,
HON. M. HENRY MARTUSCELLO,
HON. JOHN P. COHALAN, JR.,
HON. MARCUS G. CHRIST,
HON. SAMUEL RABIN, Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant-respondent,

v.

ANTHONY CONSOLAZIO,
Respondent-appellant.

The above named Anthony Consolazio, respondent-appellant in this action, having appealed to the Court of Appeals of the State of New York pursuant to permission granted by that court from an order of this court, dated March 31, 1975, which (1) unanimously affirmed a judgment of the County Court, Nassau County, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence; (2) modified trial

orders of dismissal of the same court, on the law, by deleting therefrom the enumeration of counts dismissed except counts 1 and 27 and denied motions for a trial order of dismissal except as to said two counts, and, as so modified, unanimously affirmed said orders, ordered a new trial as to the counts which were thus reinstated and directed further proceedings not inconsistent with this court's opinion and decision slip, dated March 31, 1975; and (3) remitted the case to the County Court, Nassau County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50); and the said appeal having been heard and determined by the Court of Appeals and that court, by order dated July 6, 1976, having modified this court's order, dated March 31, 1975, and remitted the case to this court with directions to dismiss the appeal taken by the People from (1) two trial orders made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively and (2) a written trial order of dismissal of the same court, entered on January 10, 1975;

Now, upon reading the remittitur from the Court of Appeals and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the appeal taken by the People to this court from the said trial orders of dismissal is hereby dismissed.

Enter:

Clerk of the Appellate Division

Opinion of Appellate Division on Remittitur from the Court of Appeals

— A D 2d — 1423 E/74

THE PEOPLE, ETC.,
appellant-respondent,
v.
ANTHONY CONSOLAZIO,
respondent-appellant.

James J. McDonough, Mineola, N.Y. (Michael J. Obus and Matthew Muraskin of counsel), for respondent-appellant.

Denis Dillon, District Attorney, Mineola, N.Y. (Jules E. Orenstein of counsel), for appellant-respondent.

On July 6, 1976 the Court of Appeals modified the order of this court (*People* v *Consolazio*, 47 AD2d 863) and remitted the case to this court with directions to dismiss the appeal taken by the People from (1) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively and (2) a written trial order of dismissal of the same court, entered on January 10, 1975.

Accordingly, the appeal taken by the People from the said trial orders of dismissal is dismissed.

HOPKINS, Acting P.J., MARTUSCELLO, COHALAN, CHRIST and RABIN, JJ., concur.